Corte costituzionale

JUDGMENT NO. 326 OF 2008

Franco BILE, President

Sabino CASSESE, Author of the Judgment

JUDGMENT NO. 326 YEAR 2008

In this case various regions seized the Court directly with a challenge to legislation implementing a decree-law issued by the government imposing certain limits on companies under public ownership or with mixed public-private ownership established by regional or local authorities which were more stringent than the limits placed on similar companies established by the state. The Court upheld the contested legislation on the grounds that it fell "under the state's exclusive legislative competence over private law insofar as ...aimed at defining the boundaries between administrative operations and business operations, ...and under the state's exclusive legislative competence over competition law insofar as ..aimed at eliminating distortions to competition".

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 13 of decree-law No. 223 of 4 July 2006, containing "Urgent measures for economic and social renewal, the restraint and rationalisation of public expenditure, as well as urgent measures relating to revenue and the fight against tax evasion", converted into law, with amendments, by law No. 248 of 4 August 2006, containing the "Conversion into law, with amendments, of decree-law No. 223 of 4 July 2006, containing Urgent measures for economic and social renewal, the restraint and rationalisation of public expenditure, as well as urgent measures relating to revenue and the fight against tax evasion", commenced pursuant to appeals by Veneto Region (2 appeals), Sicily Region, Friuli-Venezia Giulia Region and

Valle d'Aosta Region, served on 31 August and 5, 9 and 10 October 2006, filed in the Court Registry on 11 September and 11, 12, 14 and 19 October 2006 and registered as Nos. 96, 103, 104, 105 and 107 in the Register of Appeals 2006.

Considering the entries of appearance by the President of the Council of Ministers;

having heard the Judge Rapporteur Sabino Cassese in the public hearing of 24 June 2008;

having heard the barristers Mario Bertolissi and Andrea Manzi for Veneto Region, Giovanni Pitruzzella for Sicily Region, Giandomenico Falcon for Friuli-Venezia Giulia Region, Francesco Saverio Marini for Valle d'Aosta Region and the *Avvocato dello Stato* Danilo Del Gaizo for the President of the Council of Ministers.

The facts of the case

1. – Veneto Region raised, in its first appeal (No. 96 of 2006), the question of the constitutionality, in addition to other provisions of the same decree-law, of Article 13 of decree-law No. 223 of 4 July 2006, containing "Urgent measures for economic and social renewal, the restraint and rationalisation of public expenditure, as well as urgent measures relating to revenue and the fight against tax evasion", due to violation of Articles 3, 97, 114, 117, 118, 119 and 120 of the Constitution.

The contested article (entitled "Provisions aiming to reduce the costs of regional and local public bodies and to protect competition") imposes certain limits on companies under public ownership or with mixed public and private ownership created by regional or local public administrations for the production of essential goods or provision of core services for the operations of these bodies as well as, in those cases permitted by law, the contracting out of administrative functions falling under their competence. The Article stipulates, in particular, that they operate exclusively with founder and awarding bodies, may not provide services to other public or private subjects, may not hold shares in other companies or bodies and that they must have an exclusive social object. The Article contains transitional arrangements which set out the time limits and procedures for the termination of non permitted operations, and stipulates that contracts concluded in breach of the new provisions shall be void.

In the opinion of the Region, the state legislature intended, through the contested provisions, to avoid alterations or distortions of competition and to guarantee the equal treatment of operators, preventing the addressees of so-called "public service obligations", which have only been formally privatised and remain subject to the dominant influence of the public authorities, from also operating on the free market and taking advantage of the special arrangements which they enjoy. In view of these goals of the state legislation moreover, the Region avers that the contested provision infringes its sphere of autonomy insofar as, by invoking competition law requirements, it irrationally limits the legislative and administrative autonomy of the region. According to the applicant, the contested provisions "have introduced detailed legislation which does not leave any space to the region to enact legislation that takes into account local needs, nor even the time-scales for the implementation of the principles contained in state law according to the criteria of adequacy and proportionality".

2. – In its second appeal (No. 103 of 2006), Veneto Region raised by question of the constitutionality, in addition to other provisions of the same decree-law, of Article 13 of decree-law No. 223 of 2006, converted into law, with amendments, by law No. 248 of 4 August 2006, containing the "Conversion into law, with amendments, of decree-law No. 223 of 4 July 2006, containing Urgent measures for economic and social renewal, the restraint and rationalisation of public expenditure, as well as urgent measures relating to revenue and the fight against tax evasion", due to violation of Articles 3, 97, 114, 117, 118, 119 e 120 of the Constitution.

The question of the constitutionality of the same article, in addition to other provisions of the same decree-law, was also raised by Sicily Region (appeal No. 104 of 2006), by Friuli-Venezia Giulia Region (appeal No. 105 of 2006) and by Valle d'Aosta Region (appeal No. 107 of 2006).

The contested article (which, even following conversion into law, is entitled "Provisions aiming to reduce the costs of regional and local public bodies and to protect competition") imposes certain limits on companies under public ownership or with mixed public and private ownership created or participated by the regional or local public administrations for the production of essential goods or provision of core services for the operations of these bodies, in view of their operational remit, with the

exclusion of local public services, as well as, in those cases permitted by law, the contracting out of administrative functions falling under their competence. It stipulates, in particular, that they operate exclusively with founder or shareholder or awarding bodies, may not provide services to other public or private subjects and may not hold shares – except in companies which carry on financial intermediation operations pursuant to the consolidated text contained in legislative decree No. 385 of 1 September 1993 – in other companies or bodies and that they have an exclusive social object. The Article contains transitional arrangements which set out the time limits and procedures for the termination of non permitted operations, and stipulates that contracts concluded in breach of the new provisions shall be void.

3. – The appeal by Veneto Region claims that Articles 3, 97, 114, 117, 118, 119 and 120 of the Constitution have been violated. According to the Region, far from eliminating the provisions which infringed regional autonomy, the law converting the decree brought about new infringements, which were unconstitutional on the same grounds. Indeed, after conversion, Article 13 of the decree-law still contains the same infringements of the legislative and administrative autonomy of the region and local authorities challenged in the previous appeal No. 96 of 2006.

4. – The appeal by Sicily Region complains of the violation of Articles 41(1) and (3) and 3 of the Constitution on the dual grounds that Article 13 violates the principles of equality and reasonableness, as well as Articles 14(p) and 17(i) of royal legislative decree No. 455 of 15 May 1946 (Approval of the Regional Statute of Sicily Region). The Region argues that the contested provision refers exclusively to so-called "regionally or locally controlled authority companies", created or participated by the regions or by other local authorities for the production of essential goods or provision of core services for these bodies and provides that, under the terms of the above article, they must operate exclusively with founder and awarding bodies, may not provide services to other public or private subjects, not even pursuant to a call for tender, and that they may not hold shares in other companies or bodies.

According to the Region, the provision imposes on local authority companies restrictions which to not appear to be compatible with Article 41 of the Constitution which, in asserting the principle of freedom of private economic initiative (sub-section

1), “limits interventions by the state to the role of directing and coordinating public and private economic activity for social ends (sub-section 3)”. The Region adds that by imposing the prohibition concerned only on companies under public ownership or with mixed public-private ownership established or participated by the regional or local administrations, the state legislature has penalised them compared to other companies established or participated by the state or which hold concessions for public services; moreover this violates, in addition to the constitutional principle mentioned above, also the principle of equality enshrined in Article 3 of the Constitution, nor does it comply with any criterion of proportionality or adequacy (judgment No. 14 of 2004), which is essential in order to define the operational extent of state's legislative competence over “competition law”. The Region also notes that, by governing the operations of regionally controlled bodies, the state provision under examination appears to infringe the exclusive legislative competence over the “structuring of regional offices and bodies”, provided for under Article 14(p) of the Statute of Sicily Region and, in any case, that provided for under Article 17(i) of the Statute over “all other matters which involve services of predominantly regional interest”.

5. – The appeal by Friuli-Venezia Giulia Region complains of the violation of Articles 3, 41, 117 and 119 of the Constitution, as well as Article 4, sole sub-section, (i), (i-*bis*) and (vi), Article 8 and Article 48 of constitutional law No. 1 of 31 January 1963, No. 1 (Special Statute of Friuli-Venezia Giulia Region).

The Region notes as a preliminary matter that the conversion law introduced sub-section 1-*bis* into Article 1 of the decree law, which contained a “safeguard clause” according to which “the provisions contained in the present decree shall apply to the regions governed by special statute and to the autonomous provinces of Trento and Bolzano in accordance with the special statutes and the relevant implementing legislation”. Therefore, were the court to find that, in accordance with this clause, the contested provisions did not apply in Friuli-Venezia Giulia Region, the complaints made by it would lapse.

The Region's appeal contains six heads.

5.1. – In the first head, the Region claims that Article 13(1), (2) and (4) of the decree-law, as converted into law, infringe the organisational and financial autonomy of the

Region insofar as they subject companies under public ownership or with mixed public and private ownership established or participated by the regional or local administrations for the production of essential goods or provision of core services to restrictive and discriminatory legal arrangements, "without associating the restrictions with the fact of being exempt from competition requirements thanks to direct award arrangements".

The Region recalls above all that it also has standing to invoke the rights to financial autonomy of the local authorities, given that constitutional case law has found that the regions in general have such standing, since "the close connection, in particular [...] in the area of regional and local finance between regional competences and those of the local authorities means that the infringement of local competences has the potential also to create an infringement of regional competences" (judgment No. 417 of 2005).

The Region goes on to note that the severe restrictions imposed on the companies contemplated are associated "not with the specific favourable conditions under which the companies concerned carry on their operations, but with the very individual structure and object of these companies". In the opinion of the Region, if "companies established or participated for the production of essential goods or provision of core services" were to be understood as "companies which provide these services under direct award arrangements", the restrictions would be associated with the situation of privileged awards which applies to them: "and it is obvious that, if this were the case, it would be sufficient for this situation no longer to be the case in order to return to the general arrangements applicable to companies, without any restrictions". This interpretation, the Region continues, would without doubt be consistent with the stated purpose of the provision of "avoiding alterations or distortions of competition and the market and guaranteeing the equal treatment of operators". This interpretation is not however permitted by the literal wording of the provision which, in restricting the contractual capacity also of companies which do not enjoy any direct award privileges, thereby directly violates the Region's competences under the Regional Statute, insofar as it impinges on regional matters (that is on the organisation of the Region and local authorities, as well as on industry and commerce: Article 4(i), (1-*bis*) and (6) of the Statute; Article 117(4) of the Constitution, in the light of Article 10 of constitutional law

No. 3 of 2001, given that regional organisation and industry and commerce fall under the full competence of the ordinary regions) and interferes with the administrative autonomy (for which organisational autonomy is a prerequisite) and financial autonomy of the Region and of the local authorities (Articles 8 and 48 *et seq* of the Statute).

According to the applicant, the contested provisions also violate: the principle of equality laid down in Article 3(1) of the Constitution in that identical situations are treated differently, as well as the principles of reasonableness and proportionality; Article 41 of the Constitution, insofar as they preclude the exercise of the right to freedom of economic initiative which, provided that it does not have detrimental effects on competition, applies equally to public and private subjects (and in any case the rights of initiative of the private individuals in the companies under mixed public and private ownership have been infringed); "the principle of reasonableness and proportionality", insofar as the contested provisions "place drastic limitations on contractual capacity where a limit on the eventual direct award of public sector contracts would be sufficient".

5.2. – Under the second head of appeal, the Region claims that Article 13(1), (2) and (4) of decree-law No. 223 of 2006, as converted into law, are unconstitutional insofar as they infringe the organisational and financial autonomy of the Region by subjecting companies under public ownership or with mixed public and private ownership, established or participated by the regional or local administrations for the production of essential goods or provision of core services "to restrictive or discriminatory legal arrangements compared to other companies, including also the companies under public ownership or with mixed public and private ownership participated by the state or national administrations". This is, according to the Region, a ground for unconstitutionality which, in contrast to the first head, cannot be overcome through an interpretation that is compatible with the Constitution. Indeed, the contested provisions are discriminatory insofar as they penalise the legal situation of companies participated by the regions or local authorities compared to companies which have been established or are participated by the state or other national public bodies for entirely similar purposes.

The applicant argues that not only the regions and local authorities, but also the state and national public bodies have established companies under public ownership or with mixed public and private ownership for the exercise of public sector functions. Even if legislation restricting the contractual capacity of particular types of publicly controlled company were justified on the merits, a limitation on the contractual and operation capacity of *only* those companies established or participated by the regions or local authorities, "which are placed in a situation of true legal nonage", would not be justified. Therefore, continues the Region, it is clear that any discrimination framed in these terms "violates the principle of equality and amounts to an abuse of the state's legislative powers over the private law regulation of companies […] exercised not in order to enact general legislation regulating companies participated by public bodies, but exclusively to the detriment of regional and local authority companies".

5.3. – The third head of appeal avers that Article 13(1), (2) and (4) of decree-law No. 223 of 2006, as converted into law, is unconstitutional insofar as it infringes the organisational and financial autonomy of the Region through its "indiscriminate [prohibition] on companies under public ownership or with mixed public and private ownership, established or participated by the regional or local administrations for the production of essential goods or provision of core services, from 'operating' for bodies other than the founder, shareholding or awarding bodies, from providing 'services' to other public or private bodies, as well as from holding shares in other companies or bodies".

As regards the prohibition on holding shares in other companies or bodies, the Region points out that, as is also the case for state companies, the regional companies at times operate through other companies, 100% of the share capital of which is held by the public company, and therefore the contested provisions would irrationally deprive the companies concerned of all organisational flexibility and, as far as share holdings in other bodies are concerned, of all capacity to address the very matters which they are charged with confronting. A similar argument applies, according to the Region, to the restriction that companies may "operate" only with founder, shareholding or awarding bodies and that they may not provide "services" to "other public or private bodies",

which amounts to a violation not only of the principles of reasonableness and proportionality, but also of the principle of legal certainty.

5.4. – The fourth head claims that Article 13(3) of decree-law No. 223 of 2006, as converted into law, which imposes time-limits for the termination of non-permitted operations and sanctions for failure to comply with the prohibitions, is unconstitutional. According to the Region, these provisions are unconstitutional in the first place because they are both premised on and complete the unconstitutional provisions contested above.

Secondly, the third sentence, which provides that contracts concerning operations not transferred or separated shall be void, is unconstitutional on the grounds either that it is contradictory or unreasonable in view of the provisions contained in the previous two sentences. The applicant points out that the companies concerned may continue "on a transitional basis" – for twelve months – to carry out their operations; under the terms of the second sentence, these twelve months may be followed by a further eighteen months during which the "non permitted operations" may be transferred to third parties or hived off into a different company to be sold on the market. However, the Region continues, the provision contained in the third sentence – namely the statutory avoidance of contracts concerning operations not transferred or separated within the "time-limit mentioned in the first sentence" (that is on expiry of the first twelve months) – is completely absurd, since the operations transferred or separated, and by extension those not transferred or separated, may be identified only at the end of the period of eighteen months available to the regions and local authorities in order to make arrangements for transfer or separation. Therefore, prior even to the question of is unconstitutionality, the provision is impossible to apply, other than retroactively".

5.5. – A further (fifth) ground for constitutionality concerns the second sentence of sub-section 3, which provides that "the ability granted to public sector companies to transfer the operations to third parties or to separate them, creating a company to be floated on the market, must be regarded as precluding the possibility of transferring or separating these operations to another regional or local company, either already existing or to be established, which operates exclusively on the market and does not fall within the ambit of Article 13". In effect, the Region points out, "the obligation to transfer to

third parties, or float on the market (which is obviously also comprised of "third parties"), property and assets which, through the companies, constitute the economic, and where appropriate entrepreneurial, resources of the local communities infringed their financial autonomy, in open breach of Article 119 of the Constitution and Article 48 *et seq* of the regional Statute, and results in a kind of expropriation of economic activities, entirely without a basis in the Constitution and entirely lacking any connection with the objective of protecting competition".

5.6. – A further (sixth) self-standing ground for the unreasonableness of Article 13(4) of decree-law No. 223 of 2006, as converted into law, on the same grounds as the previous head consists, according to the Region, in the fact that it provides that the voidability of contracts stipulated in breach of the requirements laid down in sub-sections 1 and 2 affects all contracts concluded by the companies mentioned in sub-section 1 which, at the time when the contract was concluded, maintained a shareholding in other companies or bodies. The Region notes on this point that shareholdings are not "operations" and do not therefore fall within the reach of sub-section 3 and the time-limits provided for therein. In fact, shareholdings are primarily assets, which may easy or difficult to sell, or even legally impossible where no individual prepared to purchase them is found. Moreover, it is one thing for contracts to be void which directly concern prohibited operations (without prejudice to the challenges set out above regarding these prohibitions and their formulation), and quite another thing for contracts to be void where they relate to permitted operations which have no relationship with presumed shareholdings in other companies or bodies.

6. – The appeal by Valle d'Aosta Region avers the violation of Articles 3 and 117 of the Constitution, as well as Article 2(1)(a) and (b) of the Statute of Valle d'Aosta Region contained in constitutional law No. 4 of 26 January 1948 (Regional Statute for Valle d'Aosta).

The Region notes as a preliminary point that, pursuant to the "safeguard clause" contained in Article 1(1-*bis*) of decree-law No. 223 of 2006, as converted into law, the decree-law applies to the regions governed by special statute and the autonomous provinces of Trento and Bolzano "in accordance with the special statutes and the relevant implementing legislation". However, the literal wording of the contested

provisions does not make it possible to preclude with certainty that they apply to the regions granted special powers of self-government, and the legislation contains requirements which, if applied also to Valle d'Aosta Region, would be unconstitutional on various grounds. Therefore, the possibility that they may be interpreted in a manner which infringes the competences of the Region means that they may be challenged pursuant to the case law of this Court, which has held that the Court may be seized directly on questions raised concerning not implausible interpretations proposed by the applicant (judgment No. 412 of 2004).

6.1. – In the first head of its appeal, the Region avers the violation of the constitutional principle of reasonableness, in the form of irrationality, as well as Article 117(2) and (4) of the Constitution and Article 2(1)(a) and (b) of the Special Statute for Valle d'Aosta.

According to the Region, "as much as the legislation states its objective of protecting competition, in reality, far from removing distortions from the market or promoting an expansion of the possibilities for access of operators, it has the very different effect of excluding a category of subjects from the market", that is specifically "companies, under public ownership or with mixed public and private ownership, established by the regional or local public administrations" which satisfy the prerequisites stated above. The chilling effect on competition is made clear, in particular, by the provision that the companies which may not provide services to subjects other than founder, shareholding or awarding bodies, not even on conclusion of a tender procedure. The region argues that, "since it is precisely tender procedures which ensure *par excellence*, and indeed enhance, competition between the different economic operators present on the market, the preclusion to the detriment of some of them of the right to participate – moreover, due to the mere fact of having been established or of being participated not by any public body, but only by regional or local public bodies – causes precisely one form of that interference with and distortion of competition and the market which the contested provision purports to be seeking to avoid". Moreover, arguing that there is no relationship between the contested provision and the supposed implementation of Community obligations, the Region states that it is sufficient to note that not even the Community case law in the area of *in house providing,* which is particularly rigorous in

guaranteeing competition, has ever required that companies under public ownership or with mixed public and private ownership established or participated by regional or local administrations "for the production of essential goods or provision of core services for the operations of these bodies" of "for the performance of administrative functions falling under their competence" must operate *exclusively* with the founder or shareholding or awarding bodies. Nor is it clear, according to the Region, how the legislation can reasonably pursue competition law goals by imposing the prohibitions mentioned exclusively on companies established or participated by the regional or local public administrations, without extending the same prohibitions to similar companies established or participated by the state administrations.

Therefore, given the clear contradiction between the goal which Article 13 of decree-law No. 223 of 2006 purports to pursue (protection of competition) and the results which it attains, the contested provision encroaches *sine titulo* into an area of legislative competence conferred upon Valle d'Aosta Region both pursuant to Article 2(1)(a) and (b) of the Special Statute (which reserve to the legislative powers of the region, respectively, the areas of "structuring of regional offices and of regionally controlled bodies and the legal and economic status of personnel" as well as the "structuring of the local authorities and the relative wards"), along with the combined provisions of Article 117(2) and (4) of the Constitution, according to which the state is endowed with legislative powers only over the regulation of the "structuring and administrative organisation of the state".

6.2. – A second head of appeal claims that the provisions contained in Article 13 of decree-law No. 223 of 2006, as converted into law, violate the principles of proportionality and loyal cooperation and, again, Article 117(2) and (4) of the Constitution and Article 2(1)(a) and (b) of the Special Statute of Valle d'Aosta Region.

The Region notes that the state legislation, which encroaches on areas of law under regional competence by basing its intervention on the need to enact legislation in one of the areas – such as competition law – that is "result oriented" or cross-cutting, must in any case comply with further mandatory requirements in addition to that of rationality. In order to pass constitutional muster, it must be "justified" and "proportionate" in view of the goal pursued (judgments No. 214 of 2006, No. 175 of 2005 and Nos. 272 and 14

of 2004). Moreover, the Court has held (starting from judgment No. 407 of 2002) that the exercise of legislative power by the state in a “result oriented” area of law occurs subject to the requirement that it pursue a “unitary and indivisible” interest.

According to the applicant, the infringement brought about by the contested provisions is completely disproportionate compared to the procedures by which the goal of protecting competition is pursued. In fact, the contested state legislation comprehensively sacrifices the region's competence to enact legislation regulating companies established or participated by the Region or by the local authorities, not leaving any space for regulatory initiative by the Region. The violation of the principle of proportionality also results from the violation of the principle of loyal cooperation: despite the restriction on legislative competence in areas falling within their competence, the state legislation was not preceded by any mechanisms or procedures which put the regions in a position to participate in any manner or offer their input into the drafting of the state legislation. This applies all the more so, according to the applicant, to the regions with special powers of self-government.

The Region goes on to point out that, compared to the comprehensive sacrifice of regional competence, the “unitary and indivisible interest” had such a low priority that the state legislature neglected to extend to the prohibitions laid down in Article 13 to companies established or participated by the state administrations. If the state had really intended to pursue a unitary interest, according to the applicant, the rigid exclusion criteria should have been applied above all to the companies in which the state administrations are involved, since the state is precisely the territorial body which displays the greatest need for centralisation.

7. – In all proceedings the *Avvocatura Generale dello Stato* entered an appearance for the President of the Council of Ministers. It avers, as a preliminary matter that the conversion law No. 248 of 2006 for decree-law No. 223 of 2006 introduced a range of modifications to certain provisions of the decree contested in the first appeal of Veneto Region (see above, point 1). Accordingly, with regard to these provisions, the state representative avers supervening inadmissibility or that the matter in dispute no longer subsists.

On the merits in all appeals, the *Avvocatura Generale dello Stato* notes that the provisions contested by the regions were intended to guarantee freedom of competition, and hence fall within the exclusive legislative competence of the state in the area of "competition law" (Article 117(2)(e) of the Constitution). Moreover, the "cross-cutting" nature of this competence means that the state legislature's initiative passes constitutional muster also over areas of law which theoretically fall under regional competence, whether shared or residual.

As far as the regions' challenge to the specific and detailed nature of the legislation contained in Article 13 is concerned, the *Avvocatura Generale dello Stato* points out that the legislation contained in the contested provision essentially relates to the area of private law, which also falls under the exclusive competence of the state legislature (Article 117(2)(l) of the Constitution), "insofar as it relates to the business operations of companies governed by private law". For the same reason, according to the *Avvocatura Generale dello Stato* the regions' complaints relating to the provision which declares void any contracts concluded in breach of the provisions laid down in Article 13 are groundless.

With regard to the appeal by Sicily Region, the *Avvocatura Generale dello Stato* argues: that the complaint that the legislation failed to respect the criteria of proportionality and adequacy is generic and therefore inadmissible; that the contested provisions comply with Community law principles relating to in house tenders and state aids; that the exclusive legislative competence of the region over the "structuring of regional offices and bodies", as well as of "services of predominantly regional interest" (Articles 14(p) and 17(i) of the Sicilian Statute) has not been infringed; that the challenges concerning the alleged violation of Article 3, on the grounds of the principle of equality, and Article 41 of the Constitution are inadmissible in view of the settled case law of the Court, both prior to constitutional law No. 3 of 2001 (judgments Nos. 373 and 126 of 1997 and No. 29 of 1995), as well as after its enactment (judgment No. 274 of 2003), according to which "the regions have standing to contest the violation of constitutional provisions other than those concerning the division of competences with the state, only when that violation entails a direct or indirect infringement of the

competences conferred by the Constitution on the regions", whilst it is clear that no such infringement occurred in the case before the Court.

With regard to the appeal by Region Friuli-Venezia Giulia, the *Avvocatura Generale dello Stato* argues: that the complaints based on the alleged violation of regional legislative competence, either exclusive or shared, over the organisation of the Region and of the local authorities, industry and trade are groundless; that the challenges which the Region makes to the state provision with reference to Articles 3(1) and 41 of the Constitution, as well as the principles of reasonableness, proportionality, legitimate expectations and good faith are groundless or inadmissible; and that the challenge to Article 13(3)(ii) of the decree-law as converted into law is inadmissible since, in claiming that the ability of public sector to transfer or separate their operations is unconstitutional, the applicant grounds its complaint on the merely interpretative hypothesis that this provision precludes the possibility of transferring or separating these operations to other regional or local authority companies, which operate exclusively on the market, without discussing whether or not such an interpretation is accurate.

8. – Shortly before the public hearing, the applicant regions filed written statements reasserting their grounds of appeal. The *Avvocatura Generale dello Stato* in turn filed a single written statement, reiterating its previous arguments.

Conclusions on points of law

1. – Veneto Region seized the Court directly, raising numerous questions concerning the constitutionality of decree-law No. 223 of 4 July 2006 (Urgent measures for economic and social renewal, the restraint and rationalisation of public expenditure, as well as urgent measures relating to revenue and the fight against tax evasion) including, amongst these provisions, Article 13 from the original text of the decree, due to violation of Articles 3, 97, 114, 117, 118, 119 and 120 of the Constitution.

In four different appeals, Veneto, Sicily, Friuli-Venezia Giulia and Valle d'Aosta Regions seized the Court directly, raising numerous questions concerning the constitutionality of decree-law No. 223 of 2006, converted into law, with amendments, by law No. 248 of 4 August 2006 (Conversion into law, with amendments, of decree-

law No. 223 of 4 July 2006, containing Urgent measures for economic and social renewal, the restraint and rationalisation of public expenditure, as well as urgent measures relating to revenue and the fight against tax evasion), including, amongst these provisions, Article 13, due to violation of the following constitutional principles: Article 3 (all applicants), Article 41 (Sicily Region and Friuli-Venezia Giulia Region), Article 97 (Veneto Region), Article 114 (Veneto Region), Article 117 (Veneto Region, Friuli-Venezia Giulia Region, Valle d'Aosta Region), Article 118 (Veneto Region), Article 119 (Veneto Region and Friuli-Venezia Giulia Region) and Article 120 (Veneto Region) of the Constitution, Articles 14(p) and 17(i) of royal legislative decree No. 455 of 15 May 1946 (Approval of the Regional Statute of Sicily Region) (Sicily Region), Articles 4(i)(1-*bis*) and (vi), 8 and 48 *et seq* of constitutional law No. 1 of 31 January 1963 (Special Statute of Friuli-Venezia Giulia Region) (Friuli-Venezia Giulia Region) and Article 2(1)(a) and (b) of constitutional law No. 4 of 26 January 1948 (Special Statute for Valle d'Aosta) (Valle d'Aosta).

The contested article imposes certain limits on companies participated by the regions or local authorities for the performance of administrative functions or operations that are essential for them.

Pursuant to sub-section 1, in order to avoid alterations or distortions of competition and to guarantee the equal treatment of operators, companies under public ownership or with mixed public and private ownership – established by regional or local public administrations for the production of essential goods or provision of core services for the operations of these bodies, as well as, in those cases permitted by law, the contracting out of administrative functions falling under their competence – must operate exclusively with founder and awarding bodies, may not provide services to other public or private subjects, neither under direct award nor pursuant to tender, and that they may not hold shares in other companies or bodies.

Under the terms of sub-section 2, the aforementioned companies must have an exclusive company object and may not act in breach of the rules set out in sub-section 1.

Sub-section 3 lays down transitional provisions for the termination of non permitted operations.

Sub-section 4 regulates contracts concluded after the entry into force of the decree-law, stipulating that contracts concluded in breach of sub-sections 1 and 2 shall be void.

2. – Having reserved for a separate ruling the decision on the other provisions contained in decree-law No. 223 of 2006, both in the original text as well as that resulting from the amendments made on conversion by law No. 246 of 2006, this judgment shall examine the questions concerning Article 13.

3. – The appeals raise similar questions; the Court therefore orders that the proceedings concerned be joined for treatment together and a single decision.

4. – The questions raised with reference to Articles 114, 118, 119 and 120 of the Constitution are inadmissible since they are not supported by free-standing arguments, and are hence generic.

5. – The questions raised with reference only to Articles 3 and 41 of the Constitution are also inadmissible. According to the settled case law of this Court, also following the enactment of constitutional law No. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution), complaints raised by the regions regarding constitutional principles other than the provisions which regulate the division of competences with the state are not admissible where they do not amount to infringements of the regions' competences as provided for under the Constitution (judgments No. 190 of 2008 and, with particular reference to Article 41 of the Constitution, No. 272 of 2005).

6. – The Court finds that the challenges made by Veneto Region in appeal No. 96 of 2006, filed prior to the conversion of the decree-law, are moot in view of those, with identical content, raised in appeal No. 103 of 2006.

7. – After the appeals were filed, sub-sections 3 and 4 of the contested article were amended by Article 1(720) of law No. 296 of 27 December 2006. Although the amendments concerned have an impact on the parameters of some of the challenges raised by the applicants, they are not sufficient to result in the resolution of the matter in dispute.

8. – The further questions raised by the regions in relation to other constitutional principles are groundless.

8.1. – The said questions concern the infringement, by the contested provisions, of the regions' legislative powers over the organisation of regional and local authority

offices pursuant to Article 117 of the Constitution and, with regard to Sicily, Friuli-Venezia Giulia and Valle d'Aosta Regions, the provisions contained in the special statutes (Articles 14(p) and 17(i) of royal legislative decree No. 455 of 1946; Articles 4(i)(i-*bis*) and (vi), 8 and 48 *et seq* of constitutional law No. 1 of 1963; as well as Article 2(1)(a) and (b) of constitutional law No. 4 of 1948).

The constitutional principle and the provisions contained in the statutes cover the organisation of regional services and the relations between the regions and the companies through which the regions carry out their functions. Pursuant to Article 10 of constitutional law No. 3 of 2001, the provisions of that constitutional law which provide for self-government arrangements broader than those already granted shall also apply to the regions governed by special statute. However, whilst the regional legislative power governed by Article 117(4) is only subject to the limits laid down in Article 117(1), the legislative power of the regions governed by special statute in the area of the organisation of regionally controlled companies, which produce goods or provide services, must be subject to the additional and more stringent limits set out in Article 14 and 17 of the Statute of Sicily Region (respectively, the agricultural and industrial reforms passed by the Constituent Assembly as well as the principles and general interests underlying state legislation), Article 4 of the Statute of Friuli-Venezia Giulia Region (general principles underlying the legal order of the Republic, fundamental rules of social and economic reform, the national interest and the interests of other regions) and Article 2 of the Statute of Valle d'Aosta Region (principles underlying the legal order of the Republic, the national interest, fundamental rules of social and economic reform of the Republic).

Therefore, it is possible to refer exclusively to Article 117 of the Constitution insofar as the legislative power conferred thereunder guarantees broader self-government than that provided for under the special statutes. The question may therefore be treated uniformly.

8.2. – It should be pointed out that the provision contained in Article 1(i-bis) of decree-law No. 223, according to which “the provisions contained in the present decree shall apply to the regions governed by special statute and to the autonomous provinces of Trento and Bolzano in accordance with the special statutes and the relevant

implementing legislation" is not capable of precluding an eventual infringement of regional legislative powers. According to the case law of this Court, similar clauses formulated in generic terms do not have the effect of precluding an infringement of regional legislative powers (judgments Nos. 165 and 162 of 2007 and Nos. 234, 118 and 88 of 2006).

8.3. – The contested provisions define the extent of their application not as a function of the legal form under which the companies operate, but in relation to their company object. These provisions are based on the distinction between administrative operations under private law and the business operations of public bodies. Both types of operation may be carried on through joint stock companies, but the conditions for performing them are different. The former case involves administrative operations that fall within the remit of the public body, or are ancillary thereto, and which are carried on by joint stock companies operating on behalf of a public administration. The latter case, on the other hand, involves the provision of services directed at the public (consumers or users) in competition with others.

The contested provisions aim to separate the two spheres of operations in order to prevent a subject which performs administrative operations from at the same time carrying on business operations, benefiting from the privileges which it may enjoy *qua* public administration. It does not negate nor limit the freedom of economic initiative of the local authorities, but requires that they exercise it separately from their administrative functions, thus remedying a frequent promiscuity which the state legislature considered to distort competition.

In the light of the above, it is necessary to assess both the object of the legislation as well as its purpose.

8.4. – From the point of view of their object, the provisions under examination relate to the operations of companies participated by the regions or local authorities. This is an object which may fall under the area of administrative organisation, under regional competence, or, as is the case for the provisions governing contracts also contained in the contested article, under the area of "private law", which falls under the exclusive legislative competence of the state.

The extent of this last area of law has been specified by this Court. It has held: that the legislative power of the state embraces issues concerning private law relationships for which there is a need for uniformity on a national level; that this is not precluded by the existence of provisions that are more specific than those contained in the relevant codes; that it covers the regulation of legal persons governed by private law; and that it includes the institutions characterised by aspects originating in public law, but which maintain their private law nature (judgments Nos. 159 and 51 of 2008, Nos. 438 and 401 of 2007 and No. 29 of 2006).

The contested legislation does not fall within the area of administrative organisation because it is not intended to regulate a manner of performing administrative operations. By contrast, it falls within the area – defined predominantly on the basis of its purpose – of "private law", because it aims to define the legal regime for subjects governed by private law and to set out the border between administrative operations and operations carried on by private legal persons.

8.5. – With regard to their purpose, the contested provisions have the stated goal of protecting competition.

This Court has delineated "competition law" as follows: the possession of the relative legislative power allows the state to adopt measures to guarantee the maintenance of markets that are already competitive as well as measures to liberalise markets; these measures may also be aimed at preventing an operator from extending its own dominant position into other markets; the state initiative may consist in the enactment of detailed legislation which may have an impact upon areas of law over which legislative competence has been conferred upon the regions; it is a matter for the Court to carry out a rigorous review of the state provisions concerned, aimed at ascertaining whether the legislative initiative is consistent with competition law principles, and whether it is proportionate with this goal (judgments Nos. 63 and 51 of 2008 and Nos. 421, 401, 303 and 38 of 2007).

The purpose of the contested provisions is that of preventing privileged subjects from operating in competitive markets. Therefore, the legislation governing companies with public shareholders enacted by the state provision is aimed at preventing the said

companies from distorting competition. It therefore falls under the area of law – defined predominantly on the basis of its purpose – of "competition law".

8.6. – To summarise, the Court finds that the contested provisions fall under the state's exclusive legislative competence over private law insofar as they are aimed at defining the boundaries between administrative operations and business operations, subject to the rules of the market, and under the state's exclusive legislative competence over competition law insofar as they are aimed at eliminating distortions to competition.

8.7. – As regards the status of the contested legislation as a competition law matter, it is still necessary to assess, independently of any assessments regarding the merits of its content, the proportionality of this legislation and therefore its suitability to pursue competition law goals (judgments Nos. 452 and 401 of 2007). This review must be carried out separately for the various provisions of the contested article.

We shall first consider the provisions which prevent the companies in question from operating for subjects other than the shareholding or awarding local government bodies, imposing *de facto* a corporate separation and obliging them to have an exclusive company object. They aim to ensure equality in competition which could be undermined through the access of subjects with privileged positions in certain markets. From this point of view, they do not appear to be unreasonable or disproportionate compared to the requirements mentioned.

Secondly, it is necessary to assess the prohibition on holding shares in other companies or bodies. This provision complements the others considered above. Indeed, it is aimed as preventing the companies in question from indirectly carrying out non permitted operations through their own shareholdings or bodies under their control. The contested provision does not prevent them from holding any shares or participating in any body, but rather only from holding shares in companies or bodies which operate in sectors barred to the companies themselves. When read in these terms, the provision appears to be proportionate with the goal of protecting competition.

Finally, the further provisions laying down transitional provisions and making provision for contracts concluded following the entry into force of the decree-law complete the provisions considered above as well as backing them up with sanctions

and, for their part, do not unreasonably regulate the period of adaptation to the new legislation by the companies to which it is addressed.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

1) *rules* that the question of the constitutionality of Article 13 of decree-law No. 223 of 4 July 2006, containing "Urgent measures for economic and social renewal, the restraint and rationalisation of public expenditure, as well as urgent measures relating to revenue and the fight against tax evasion", converted into law, with amendments, by law No. 248 of 4 August 2006, raised by Veneto, Sicily, Friuli-Venezia Giulia and Valle d'Aosta Regions with reference to Article 3 of the Constitution in the appeals mentioned in the headnote, is inadmissible;

2) *rules* that the question of the constitutionality of the same provision raised by Sicily and Friuli-Venezia Giulia Regions, with reference to Article 41 of the Constitution in the appeals mentioned in the headnote, is inadmissible;

3) *rules* that the question of the constitutionality of the same provision raised by Veneto and Friuli-Venezia Giulia Regions, with reference to Article 119 of the Constitution in the appeals mentioned in the headnote, is inadmissible;

4) *rules* that the question of the constitutionality of the same provision raised by Veneto Region with reference to Articles 114, 118 and 120 of the Constitution in the appeals mentioned in the headnote, is inadmissible;

5) *rules* that the question of the constitutionality of Article 13 of decree-law No. 223 of 2006, converted into law, with amendments, by law No. 248 of 4 August 2006, containing the "Conversion into law, with amendments, of decree-law No. 223 of 4 July 2006", raised by Veneto, Sicily, Friuli-Venezia Giulia and Valle d'Aosta Regions in the appeals mentioned in the headnote, with reference to Article 117 of the Constitution, Article 14(p) and 17(i) of the Statute of Sicily Region, Articles 4(i)(i-*bis*) and (vi), 8 and 48 *et seq* of the Statute of Friuli-Venezia Giulia Region, and Article 2(1)(a) and (b) of the Statute of Valle d'Aosta Region, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 30 July 2008.

Signed:

Franco BILE, President

Sabino CASSESE, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 1 August 2008.

The Director of the Registry

Signed: DI PAOLA